

# Failing Efforts to Delegitimize the Incoming Biden Administration

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2020-12-29T17:07:57

When state actors ignore evidence – or in the case of allegations of widespread election fraud, the lack of evidence – toward obtaining some political advantage, the community's evaluation of the condition of *the rule of law* comes out badly. Hence the ongoing refrain in the [American press](#) that those who refuse to accept Joe Biden's presidential election victory are undermining the rule of law. Citizens are aware that power divorced from knowledge, resting on beliefs unjustified by the evidence, ineluctably tends toward the abuse of that power. At the same time, however, degradation of the rule of law today leaves it in a state of disrepair tomorrow. Alleviating harm to the way in which people morally appraise their legal system is not an easy fix.

In turn, the rule of law appraisal directly impacts the *legitimacy* of a state's administration. From the point of view of the larger population, conduct on the part of state officials and legal actors tending to undermine the rule of law can similarly condition the people's attitudes about the governing group's overall legitimacy, and in particular, engender the intended outcome of eroding the new group's legitimacy. Chaos created now dislodges institutional integrity later.

## The legal system weaponized

Degradation of the rule of law is particularly insidious when efforts that bolster the abuse of power translocate from the purely political realm to the judicial system. Because ethical precepts of professional responsibility in the U.S. tend to label attorneys "officers of the court," whether or not a fiction, a treacherously coordinated strategy on the part of ill-intentioned lawyers can also rebound against the integrity of judicial institutions. Courts are particularly reluctant to label "frivolous" those lawsuits initiated by well-heeled legal professionals, particularly when in service of powerful political constituents.

Following the U.S. election, certain officers of the court have discounted longstanding democratic norms by willingly [filing lawsuits](#) by the dozens in the swing states, based on unsupported suspicions and harebrained claims. Seeking to curry favor with the president or his base and to perpetuate his regime, this conduct also counts against the rule of law. This is because the legal system is made to appear vulnerable to being weaponized by a segment of the legal community bent on carrying out an anti-democratic agenda.

As attested by the extraordinarily poor quality of the legal papers filed, use of the courts to undermine the election aims, as a practical matter, less at obtaining favorable legal outcomes than at an assault on the legitimacy of the incoming

Administration. Self-interested actors can work to “[manufacture](#)” a legitimacy crisis, by getting lots of people to sign on to the damning critique. A majority of Republicans still believe that Trump “actually won” the election, but for “election rigging” and “voter fraud.” This willful desublimation of grievances will make it all the more difficult for the Trump base to recognize the benefits of the modest but consequential reforms and correctives likely to be adopted in the next four years.

## Efforts to delegitimize seek to generate resistance

But more than skewing the perceptions of large segments of the population, or “[kinking](#)” their preferences away from outcomes that might be genuinely beneficial, an administration’s lack of legitimacy, even when undeserved, causes the regime to fail to satisfy a minimum requirement of governance, and hence justifies resistance. This is the meaning of and intent behind outgoing Education Secretary Betsy DeVos’s [plea to career employees](#) at the Education Department to “be the resistance” when the Biden administration comes into power.

Bureaucratic resistance, in turn, erodes the level of acceptance on the part of a government’s own civil service, and further undermines an administration’s legitimacy, in this case from within. The fallen regime’s assaults on legitimacy are multifaceted, and are even willing to plunge headlong into the sacrifice of one’s own rectitude toward delegitimizing the leadership to follow. In ordinary times, it takes work to construct and convey the legitimacy of the modern administrative state. As Sidney Shapiro and his colleagues have [commented](#), “[t]he history of administrative law in the United States constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy.” So efforts that run counter to, or seek to undermine, such legitimacy begin with a home field advantage.

## The assault on legitimacy backfires

Yet efforts to assuage Trump’s predilections by assailing the incoming Biden Administration’s legitimacy are in free fall. Dozens of courts, and scores of election officials, have [categorically rejected](#) the serial claims that fraud or irregularities affected the outcome of the 2020 U.S. election. To the extent that efforts to harness the legal system’s powers toward undemocratic outcomes are turned back, a perceived fragility in the rule of law is offset by its demonstrated resilience.

A regime’s legitimacy hinges, to a large extent, not solely on its sociological acceptance, but on the resilience of moral justifications of its authority, as implicated by its perceived *commitment* to the rule of law. A balloting outcome sustained in the face of compelling evidence of election law violations, or of a perversity in the law that overlooks an undemocratic election practice, casts a specter of illegitimacy. And, conversely, if citizens judge an election and the affairs leading to a turnover of power as having been in accord with the rule of law, then it is likely they will view the incoming administration as legitimate.

Legitimacy rests on the people's point of view, more so than on the perspectives of theorists and practitioners concerning the legal status of the regime's arrangements, actions, or failures. In the great divide, many hard-boiled citizens view legal and even constitutional norms and electoral arrangements with the same disdain they share for opposing political camps. This disdain isn't confined to the "nationalist" right wing, although its gun-toting ground troops have recently [flirted with](#) notions of kidnapping and assassination. More conventional stirrings of doubt concerning the non-democratic nature of the electoral college were planted, or more likely [reaffirmed](#), by the 2016 election, in which Donald Trump won the electoral college with three million fewer votes than Hillary Clinton, and with approximately one-third of those electoral votes coming from states in which he won less than half of the popular vote.

While problems concerning the electoral system naturally continue to be much discussed, these have not really been the focus of attention in 2020. Certainly, the electoral count has come in at 306 for Biden, 232 for Trump, and with Biden amassing over 7 million more votes than Trump. Rather, the discord emanates from the group disparagingly labeled "vote flakes" in the popular discourse. The vote flakes cannot be automatically written off, however, simply because most folks disagree with them, or merely in view of the outlandishness of their claims. Because both the rule of law and legitimacy rest on moral appraisals of the legal system as well as broader elements of the state apparatus, disagreements are inevitable. The 17<sup>th</sup> Century German jurist Samuel von Pufendorf, for example, [described](#) not only the people's inability to rely on the king's justice, but also their inability to converge on standards for appraising that justice.

Pufendorf's point, however, as [Gerald Postema](#) crystalized it in a modern voice, was that these circumstances, leading inevitably to profound discord, incentivized the creation of law, namely, a societal mechanism that would satisfy "the deeper need to unify the judgment of the people, to enable them to speak the language of justice to each other in a single voice." Public law's main purpose has been to organize formal structures for maintaining the civil peace in the face of otherwise unresolvable conflicts. This does not mean, by any stretch, that legal institutional actions within those structures come out justly or equitably. But even erosion of rule of law commitments to procedural justice and to restrained exercise of power can leave fairly intact collective attitudes adjudging as legitimate the state's component powers, institutions, and agents.

Deciding the competing claims about election legitimacy has not been a difficult project for the most part. On one side has been the Trump wing, and on the other the overwhelming coalition, on this particular issue, of (1) Democrats generally, (2) state officials, including attorneys general and secretaries of state having a stake in the integrity of local election practices, and even (3) increasingly large groups of Republican officials. What counts most is the common understanding that, when the laws align with stable notions of what the rule of law demands, then legitimacy tends to follow as a fruit of that alignment. Empirical attitudes toward legitimacy tend to harmonize with [John Rawls](#)'s conceptual claim that exercises of political power

are “fully proper” when they embody principles that free and equal citizens may reasonably be expected to endorse by virtue of their “common human reason.”

## The legal community’s obligation

For better or for worse, public morality concerning the rule of law will often circle back to the legal community, finding its sources and influences about the legal system’s standing in the things lawyers have to say about it all. Certainly, in the real world, a convergence of that community’s views is not often likely. And sometimes rule-of-law and legitimacy concerns can pull segments of the legal community in competing directions, albeit rarely to such an embarrassing extent as has occurred in the post-election period.

The hope is always, however, that legality will temper the king’s sense of justice. When this has become impossible at certain historical moments, it has even been the case that the dialectic running between the legal and popular communities reflects circumstances in which illegality *enhances* legitimacy. As an historic example, one of the founding documents of the American Constitution, *Federalist # 40*, conceded the illegality of the rebellion of the “several states,” but deemed this justified “by the circumstances in which they were placed.” As [Bruce Ackerman](#) writes, Madison linked the Convention’s authority and the legitimacy of its work product, the Constitution, to “the institutional form that Publius’s contemporaries associated most intimately with We the People.”

It is difficult to divine what calamitous shifts in the law would have resulted from a second Trump term. Certainly, the American public garnered some idea of what might occur upon reports of the obscure White House meetings gathering the season’s deflationists about the content of American democracy, most notably Donald Trump, Rudy Giuliani, Michael Flynn, and Sidney Powell. These tragicomic characters have been said to caucus on such otherwise untoward notions as [seizing the swing states’ voting machines](#) and [declaring martial law](#).

However, with Trump seemingly now retreating into the realm of [corrupt presidential pardons](#), the legal community, with unfortunate exceptions noted, has reacted forcefully by pressing the rule of law’s strictures against the monumental abuses of power that would be capable of overturning the election outcome. The societal interest in democratic legitimacy has both doomed the still-sitting president’s post-election campaign and provoked the public’s meta-interest in constitutional practices. In this respect, Trump’s dwindling base of support betokens the currently expanding movement, as [Jürgen Habermas](#) put it in another context, toward “thinking in the colder and barer concepts that constitute the emancipatory protocols of a community under the rule of law.” Americans have seldom been more self-consciously focused on rule-of-law concerns, and on the pressing need to foster a sense of the legitimacy requisite to a beneficial turn in governance.